

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs November 27, 2007

STATE OF TENNESSEE v. MITCHELL SIMPSON

Appeal from the Circuit Court for McMinn County
Nos. 05-175, 05-176, 05-205 Amy Reedy, Judge

No. E2007-00866-CCA-R3-CD - Filed February 25, 2008

In August 2006, the McMinn County Circuit Court, after a hearing, revoked the probation of the defendant, Mitchell Simpson, and ordered that the defendant serve the remainder of his five-year sentence in the Department of Correction. The defendant did not file a direct appeal of the probation revocation order. In February 2007, the defendant filed a motion for reduction of sentence pursuant to Rule 35 of the Tennessee Rules of Criminal Procedure. The trial court subsequently denied the defendant's motion. The defendant appeals, arguing that the trial court erred in denying the defendant's motion. After reviewing the record, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ALAN E. GLENN, JJ. joined.

Brian J. Hunt, Clinton, Tennessee, for the appellant, Mitchell Simpson.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; R. Steven Bebb, District Attorney General; James H. Stutts, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The record reflects that in March 2005, the McMinn County Grand Jury indicted the defendant in case 05-175 on one count of rape and three counts of contributing to the delinquency of a minor. That month, the grand jury also indicted the defendant in case 05-176 on one count of conspiracy to commit arson, one count of filing a false police report, and one count of arson. In April 2005, the defendant was indicted in case 05-205 on one count theft of property over \$1000. On August 8, 2005, the defendant pled guilty as a Range I, standard offender, to one count of statutory rape, a Class E felony, one count of evidence tampering, a Class C felony, one count of filing a false insurance claim, a Class C felony, and one count of theft of property over \$1000, a Class D felony. All other charges were dismissed. The defendant was sentenced to two years for statutory rape, three years for evidence tampering, three years for filing a false insurance claim, and

two years for theft. In each case, the defendant was ordered to serve sixty days in the county jail and the balance of his sentence on probation. The trial court ordered that the theft sentence run consecutively to the sentences on the other convictions, which ran concurrently, resulting in an effective sentence of five years.¹

On September 9, 2005, a probation violation warrant was issued against the defendant after he failed to report for his sixty-day jail sentence. The defendant ultimately reported to jail and served his sixty-day sentence, thus avoiding a revocation hearing, but on January 17, 2006, another probation violation warrant was issued against the defendant, alleging numerous violations of his probation conditions. On April 7, 2006, the trial court held a revocation hearing; at the conclusion of the hearing, the defendant's probation was revoked and he was ordered to serve four months in the county jail, after which time he could again be placed on probation.

On June 23, 2006, another probation violation warrant was issued against the defendant. A probation revocation hearing was held on August 14, 2006. At that hearing, the defendant's probation officer, Jim Hake, testified that on June 17, he received a telephone call from Agent Barry Brakebill with the Tennessee Bureau of Investigation. During that call, Agent Brakebill said that he had seen the defendant in the bar area of the restaurant located at the B&B Marina in Monroe County. According to Hake, this constituted a violation of a condition of the defendant's probation in which he was "prohibit[ed] . . . from entering an establishment whose prime purpose is to sell alcoholic beverages, [such as] taverns, bars, clubs, etc." Hake also stated that he based the defendant's probation violation on the fact that the defendant was supposed to be in jail after the April 7 probation revocation order was entered.

Lieutenant Melba Hutton with the Rhea County Sheriff's Department said that she was in charge of the Rhea County Jail when the defendant reported there on April 10, 2006, to serve his jail sentence following the revocation of his probation. Lieutenant Hutton said that the defendant was authorized to work with his father's construction company on work release. The defendant was allowed to work outside the jail from 7:00 a.m. to 8:00 p.m. seven days per week. Lieutenant Hutton testified that records from the jail indicated that the defendant returned to jail after 8:00 p.m. several times during the three weeks before he was returned to the McMinn County Jail on June 20. On cross-examination, Lieutenant Hutton indicated that although the defendant had returned late to jail on several occasions, no remedial actions were taken because the defendant did not present a problem to jail staff. She also said that she was not aware that the defendant was working anywhere other than with his father.

The defendant's main assertions at the revocation hearing were that he was at the restaurant on work release and that the restaurant's primary purpose was not to serve alcohol. To that effect,

¹The original judgments, dated August 8, 2005, stated that all sentences were to run concurrently. On January 12, 2007, an amended judgment was issued in case 05-205 (the defendant's theft conviction) noting that the theft sentence should have been consecutive to the other sentences "as recorded on the record in Criminal Court on August 8, 2005." The transcript of the defendant's sentencing hearing does not appear in the record, but the probation orders on each case, dated August 8, 2005, do appear in the record and indicate a total effective sentence of five years.

the defendant called DeeAnn Pederson, the owner of the marina and the restaurant at which Agent Brakebill observed the defendant. Pederson said that her restaurant was a full-service restaurant that served a full menu at breakfast, lunch, and dinner, and also served beer. She testified that although she saw the defendant at the restaurant often, she did not see the defendant drinking alcohol while he was at the restaurant. Robert Patton testified that he employed the defendant servicing boats at the B&B Marina because the defendant's air conditioning business "was slow and he needed some extra work." Patton said that he saw the defendant eat at the restaurants at the marina several times but never suspected that the defendant was drinking on the job or drinking at the restaurants. The defendant testified that he had completed repairing a cooler at the restaurant at the B&B Marina the evening of June 17 when he saw Agent Brakebill. The defendant asserted that he did not drink any alcoholic beverages at the restaurant that evening. The state then recalled Hake as a rebuttal witness. Hake said that he had to approve the defendant's work locations, and that he would not have cleared the defendant, a registered sex offender, to work at a marina where women and children were present.

At the close of the hearing, the trial court revoked the defendant's probation. Before the trial court was able to announce its sentence, the defendant acknowledged that he was wrong and asked that the trial court order him to serve the remainder of his sentence in prison. The trial court granted the defendant's request, ordering the defendant to serve the remainder of his five-year sentence in the Department of Correction. The defendant did not appeal the trial court's ruling.

On January 12, 2007, the trial court filed an amended judgment of conviction in the defendant's theft case, as well as an amended probation revocation order in which the defendant was given credit for time served. On February 12, the defendant filed a Motion for Reduction in Sentence pursuant to Rule 35 of the Tennessee Rules of Criminal Procedure. In that motion, the defendant repeated his argument from the probation revocation hearing that the restaurant at which he was located "was not an establishment whose prime purpose was to sell alcoholic beverages," and therefore he did not violate that condition of his probation in which he agreed to stay out of such establishments. The defendant attached a letter from the restaurant's owner detailing the restaurant's alcohol sales for 2006 and the restaurant's menu, but the defendant's motion did not contain any legal argument. A hearing on the motion was held on April 9, 2007. At that hearing, the defendant presented no new evidence and made no legal argument but rather asked for leniency from the trial court so that he would not have to serve his entire five-year sentence in prison. Specifically, the defendant sought a sentence involving split confinement or release into the community corrections program. The trial court expressed its belief that it was without jurisdiction to hear the motion because the defendant was in the custody of the department of correction. The court also stated that even if the court had jurisdiction, it would not reduce the defendant's sentence. The trial court then denied the defendant's motion. This appeal follows.

ANALYSIS

The defendant raises his issue as a denial of his motion for suspended sentence under Rule 35 of the Tennessee Rules of Criminal Procedure. The rule provides:

(a) Timing of Motion. The trial court may reduce a sentence upon motion filed within 120 days after the date the sentence is imposed or probation is revoked. No extensions shall be allowed on the time limitation. No other actions toll the running of this time limitation.

Tenn. R. Crim. P. 35(a). The rule also mandates that the court “may reduce a sentence only to one the court could have originally imposed,” and states that the court may deny a Rule 35 motion without a hearing. Id. (b)-(c). Rule 35 “does not vest the defendant with a remedy as of right.” State v. Elvin Williams, No. M2006-00287-CCA-R3-CO, 2007 WL 551289, at *1 (Tenn. Crim. App. Feb. 27, 2007), app. denied (Tenn. 2007). Rather, as the comments to this rule state, “[t]he intent of this rule is to allow modification only in circumstances where an alteration of the sentence may be proper in the interests of justice.”

In this case, the defendant’s probation was revoked on August 14, 2006. The defendant did not file his Rule 35 motion until February 12, 2007—after the 120-day limitations period established by the rule had expired. Thus, we conclude that the trial court properly denied the defendant’s motion. The defendant is not entitled to relief on this issue.

CONCLUSION

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

D. KELLY THOMAS, JR., JUDGE